IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No.203 of 2006

Waman Trambak Moule .. Appellant

versus

Vishnu Trambak Moule & Anr. .. Respondents

...

Mr.M.M. Sathaye for the appellant.

Mr.R.M. Haridas for the respondents.

CORAM : D.G. KARNIK, J

DATED : 28th August 2006.

P.C.:

1. Heard learned counsel for the parties.

2. By this appeal, the appellant challenges the order dated 13th November 2005 passed by the learned Joint Civil Judge, Sr. Division, Nashik dismissing the appellant's application under Order 9 Rule 9 of the Code of Civil Procedure for restoration of the

appellant's suit to file.

3. The appellant had filed a suit, bearing Special Civil Suit no.50 of 1998 against the respondents for recovery of damages. The suit was posted for hearing on 16th October 2001. When the matter was called out, the appellant was absent and the suit was dismissed for default under Order 9 Rule 8 of the Code of Civil Procedure. The appellant then filed an application for restoration of the suit to file. By the order dated 15th November 2005, the trial court rejected the application. That order is impugned in this appeal.

4. The appellant and the respondent no.1 are brothers. The appellant resides at Mumbai while the respondent no.1 resides at Nashik. The appellant had filed the suit for damages in the Court of Civil Judge, Sr. Division, Nashik. The suit was posted for hearing on 16th October 2001. According to the appellant, he went to Nashik on 14th October 2001 for preparing for the hearing of the suit on 16th October 2001. However, he caught influenza and was advised rest from 15th October 2001 to 17th October 2001. He therefore could not attend the Court on 16th October 2001. According

to the appellant, he could not attend the court because of illness and that was a sufficient cause for his absence. The trial court ought to have restored the suit to file.

5. In the trial court, respondent no.1 contended that the appellant had not come to Nashik at all but had gone to Delhi. The trial court held that the respondents had not adduced any evidence to show that the appellant had gone to Delhi on 16th October 2001 and disbelieved the case of the respondents that appellant had been to Delhi. However, the trial court dismissed the application for restoration principally on two grounds. Firstly, he held that there was a variance in the evidence of appellant and his Doctor. The appellant had stated that he was examined in the hospital while Dr.Pawar stated that he had examined the appellant at his residence. The trial court held that this variance was fatal and therefore disbelieved the case of the appellant that he was ill. The trial court also noted that appellant had attended the funeral of his aunt at Nashik on 20th October 2001. The trail Court therefore opined that if the appellant was present in Nashik on 20th October 2001 after the dismissal of the suit, he ought to have filed the

application forthwith and as he did not file the application till 19th November 2001, the application was required to be dismissed.

6. The appellant resides at Mumbai. The appellant has gone to Nashik on 14th October 2001. It is not shown that the appellant had any other business to go to Nashik on 14th October 2001. If so, there is no reason to hold that appellant who had gone to Nashik on 14th October 2001 only for the purpose of the hearing of the suit on 16th October 2001, would remain absent on 16th October 2001 for no reason. The evidence of the appellant that he became sick on 15th October 2001 may be viewed from this angle. The trial court has not held that Dr.Pawar at Nashik did not treat the appellant. The treatment at the hands of Dr.Pawar is believed. The pre-ponderance of probability would be that appellant who had gone to Nashik for the purpose of the suit would not remain absent unless he was really ill. The trial court has ignored the fact that appellant had travelled from Bombay to Nashik for the purpose of the suit while considering the pre-ponderance of probabilities. No doubt there is some variance in the evidence of Dr.Pawar and the appellant. However, it could be on

account of passage of time. The appellant or Dr.Pawar may have committed an error in deposing whether the patient was an indoor patient or an outdoor patient. In any event, if the appellant was sick and was unable to attend, it matters not whether he was an indoor patient or an outdoor patient. The question is whether there was a sufficient cause for remaining absent. Illness would be sufficient cause irrespective of whether the appellant was an indoor patient or an outdoor patient.

7. The other ground as to why the appellant did not file the application for restoration immediately after 10th October 2001, to my mind, is irrelevant. It is not disputed that after taking into consideration the time requisite for obtaining of the certified copy of the order of dismissal, the application was filed in time. If the application was filed in time, mere delay in filing of the restoration application cannot be a ground for refusing the application.

8. For these reasons, the impugned order needs to be set aside and the inconvenience that is caused to the respondent can be compensated by awarded sufficient costs.

9. Accordingly, the appeal is allowed. Impugned order is set aside. Applicant's application bearing Misc. Application no.279 of 2001 for restoration of the suit is allowed and Special Civil Suit no.50 of 1990 is restored to file subject to the appellant paying costs of Rs.5,000/- to the respondents.

10. Costs shall be paid within a period of six weeks as a condition precedent. Parties shall appear before the trial court on 28th September 2006.

11. All concerned to act on a copy of this order. A copy of this order shall be sent to the Court of Civil Judge, Sr. Division Nashik,

(D.G. KARNIK, J)